IN THE RESIDENTIAL PROPERTY TRIBUNAL SERVICE FOR THE LEASEHOLD VALUATION SERVICE

LEASEHOLD REFORM HOUSING AND URBAN DEVELOPMENT ACT 1993, SECTIONS 24 & 91.

REF:LON/00AW/OCE/2007/0236

Premises:	37 Cadogan Square London SW1X OHU
Nominee Purchasers:	Evangelos Tsiapkinins & John M Stephenson
Represented by:	Mr. Munro, counsel Messrs, Bircham Dyson Bell, solicitors Mr. Robert Orr Ewing, (expert witness)
Landlord:	The Earl Cadogan
Represented by:	Mr. Buck-Pitt, counsel Pemberton Greenish, solicitors Mr. Simon Scott-Barrett, MA FRICS (expert witness)
Intermediate Landlord:	Hasler Properties Limited
Represented by:	Bircham Dyson Bell LLP, solicitors
Tribunal:	Ms. L M Tagliavini, LLM, DipLaw, BA(Hons) Mr. J C Avery BSc FRICS Mr. L G Packer
Hearing Dates:	27th & 28th November & 6th December 2008
Inspection:	14th January 2008

Introduction:

1. This is an application made on 27/6/07 by the landlord, The Earl of Cadogan, pursuant to section 24 of the Leasehold Reform, Housing and Urban Development Act 1993 ("The Act") seeking the Tribunal's determination of the premium payable in respect of the freehold of the subject property ("the Building") and the covenants to be contained in the Transfer. This is a 6 storey terraced (including basement), Grade II listed property circa 1895. The Building has at some time been converted to comprise 2 maisonettes and 3 flats with caretaker's accommodation at basement level. The maisonettes/flats are let on underleases expiring 15th March 2023, with the exception of Flat 3, which is subject to an extended lease expiring 15th March 2113. There is a clause in the lease of Flat 3 making reference to an application under section 61 of the 1993 Act, the effect and operation of which clause is in issues between the parties. The Building is subject to a headlease in favour of Hasler Properties Limited, which expires on 25th March 2023.

2. The Applicant also seeks to impose a restrictive covenant concerning the use of the Building, requiring that the use remain in the same form as the head lease for the remainder of the term (i.e. until 2023), and thereafter, seeks to impose a re-worded covenant to permit use as a single dwelling and up to six flats.

3. The parties agreed the following matters:

(i) Valuation date – 19th February 2007;
(ii) Unexpired term – 16.07 years;
(iii) GIA house – 8,615 sq.ft;
(iv) Relativity, unexpired terms of 16.07 years to freehold – 38.5%;
(v) Deferment rate if valued as flats – 5%;
(vi) Capitalisation rate for headlease rent and underlease rents – 5.5%;
(vii) The adjustment of comparable evidence by the Savills' Index – 583.7 (houses) and 353.6 (flats) as at valuation date;
(viii) No improvements, the effect of which is to be disregarded;
(ix) The improved value of Flat 3 - £2,240,700;

(x) The comparables (but not the weight to be attached to them or the adjustments to be made thereto.)).

The Tribunal was therefore asked to determine:

(i) Whether the property is to be valued as a building that can be reconverted to a house or as flats?

(ii) The freehold vacant possession value of the property for conversion to a house;

(iii) If to be valued as flats - the value;

(iv) The weight to be attached to the different comparables;

(v) The appropriate deferment rate to be applied;

(vi) Whether the restrictive covenant as to user should form a term of the Transfer?

4. By a Landlord's Notice to Act Independently dated 27th November 2007, the Tribunal was notified by solicitors acting for the intermediate landlord Hasler Proprties Limited that it intended to deal directly with the Nominee Purchase in connection with the acquisition of its interest. The Intermediate Landlord was not represented at the hearing of this Application and made no further representations to the Tribunal.

5. In summary the respective parties asserted that:

Applicant:

i. The building should be valued as a property for reconversion to a house;

ii. The transfer should be in the terms proposed by the Applicant which included the covenant;

iii. The premium payable is £6,132,500 (as a house) of which £1 is payable to the head lessee or £3,932.500 (as flats) with £1 payable to the head lessee.

Respondent:

iv. The building should be valued as flats – its current configuration;

v. The restrictive covenant proposed by the Applicant should not be included;

vi. The premium payable is £3,602,328 (amended) as flats or £4,522,000 as a house.

House or Flat & Values

6. Mr. Munro, for the Applicant stated that it was a matter of common ground between the parties, that the subject property is more valuable as a house than as flats and therefore should be valued as a house. In support of the Applicant's assertion that the subject property should be valued as a house, Mr. Munro relied on the evidence of Mr. Scott-Barrett MA FRICS of Cluttons, given both orally to the Tribunal and his report dated 22nd November 2007 (with 20 Appendices). In his evidence Mr. Scott-Barrett told the Tribunal that there is a strong market in the locality for single-family houses, with ten already present in Cadogan Square. Details of comparable houses in the immediate vicinity were given and included 16 Cadogan Square, sold for £28 million in 2007 without a mews attached or garaging but having been fully refurbished. Mr. Scott-Barrett also referred to 36 Cadogan Square sold in May 2007 for £18million said to be situate in a poorer location off the Square and believed to be unmodernised.

7. Mr. Scott-Barrett stated that it was likely that not only developers would be interested in taking on an unimproved building for reconversion to a house but also private individuals as evidenced by the sale of Nos. 16 and 36 Cadogan Square, formerly a conversion into flats and an unmodernised house respectively and redeveloped for single family occupation. Mr. Scott-Barrett asserted that for flat conversions, £200-£300 per sq.ft. is a reasonable estimate of costs but in the case of reconversions and modernisation of a single family house, the total conversion could cost up to £500 per sq,ft. Mr. Scott-Barrett referred to a number of other properties in his comparables including 28 Cadogan Square sold in April 2006 for £12.65 million. This is a house with no view of the communal garden but with an adjoining mews house, and although in fair condition was without the original central staircase and is now being remarketed. Mr. Scott-Barrett also referred the Tribunal to 54 Clabon

Mews, 11 Egerton Place, 25 Lennox Gardens, 47 Hans Place, 23 Cadogan Place, 8 West Eaton place and 3 Herbert Crescent, all of which comparables were duly inspected externally by the Tribunal, along with the Respondent's comparables at the conclusion of the oral hearing together with subject premises.

8. Mr. Scott-Barrett also referred to the recent sale of 25 Cadogan Square where it was agreed between the parties that the valuation should be on the basis of a reversion to a house. He asserted that these comparables and agreement established that there is a demand in the market for houses in prime central London garden squares, of which Cadogan Square is one. Mr. Scott-Barrett also stated that the valuation of the property as a house is also dependent on the freeholder at the time purchasing back the extended lease of Flat 3 at full market value, which has an agreed unimproved value of £1,901,200 and using an agreed margin of £250 per sq.ft. gives and improved value of £2,240,700.

9. As an alternative approach. Mr. Scott-Barrett analyzed the values of the property as flats, and as agreed between the parties used the Savills Prime Central London South West Flats Index to update comparable sales. Flat 1 in the subject Building sold in May 2003 on its then 19 year unexpired lease for £1.1 million (£672 per sq.ft.). By indexing this figure using the agreed Index it gives a figure of £2.58 million (£1,549 per sq.ft). Mr. Scott-Baker stated that in regard to the other flats in the Building he preferred to adjust the sale of the flat to take some account of improvements and assess the tone of the comparables as the layouts of the other flats are not generally similar and rely on a considerable degree of indexation. Flats 2, 3 and 4 had agreed values with the Respondent's expert, but Flat 5, a maisonette sold for £1.1 million would indicate a long lease of £1.998 million or £1,808 per sq. ft. in contrast to the price per sq. ft for the other flats ranging from £1,325 to £1,700 per sq. ft. Mr. Scott-Barrett speculated that either all the other evidence is too low or there was a particular reason for the purchaser to pay such a high price. In any event Flat 5 could not be valued at less than £1,400 per sq, ft.

10. On the issue of deferment, Mr. Scott-Barrett applied 4.75% adopting the approach for houses used in *Sportelli* [2007] EWCA Civ 1042. He stated that as there are no management difficulties affecting the freeholder, it was inappropriate to adjust the rate to 5%.

11. In closing submissions (both written and oral), Mr. Munro said that there was substantial evidence to support his contention that there was as at the valuation date, a demand for houses in this Square and environs. He asserted that the valuation must have regard to the value of the vacant possession put to the best use, which in this case was as a house rather than as flats. He accepted that there was no evidence that the Nominee Purchaser wanted to take advantage of the purchase as flats and convert to a house. However, a notional purchaser at valuation date bidding against other purchasers would want to extract maximum value and Mr. Orr-Ewing acknowledged that such a notional purchaser would likely outbid the Nominee Purchaser by £500 because of the development potential. Mr. Munro submitted that the Tier A and B approach adopted by Mr. Orr Ewing from his colleague, Mr. Flint of Knight Frank and his evidence to a different Tribunal on an unconnected matter was unreliable as the merger of Tiers B and C in Mr. Flint's original report and the omission of a number of comparables analysed by Mr. Flint was telling, as was Mr. Orr Ewing's admission he had not used this method of analysis before. Mr. Munro asserted it was common ground that the house would have a higher per square footage value than a mews house and therefore there was an element of double recovery by Mr. Orr-Ewing in his approach of valuing a mews house at the same value as the attached house. Mr. Munro asserted that the evidence of the sale at 28 Cadogan Square was very important evidence and was the best possible evidence that properties, which are already houses, are having considerable sums spent on them in refurbishment costs. The rejection of this evidence by Mr. Orr-Ewing from his 'Tier A' comparables was mistaken, as this is a house currently undergoing major renovation works.

12. The Respondent relied upon the oral expert evidence of Mr. Orr Ewing of Knight Frank and that contained in his report dated 23rd November 2007 (with 20 Appendices). Mr. Orr Ewing stated that he had carried out his valuation on the basis that the Building was valued as flats and drew upon a schedule of relevant comparable sales in Cadogan Square. Mr. Orr Ewing valued the top maisonette at £1016 per sq. with reference to a sale of the 4th/5th floor flat at 54/6 Cadogan Square in June 2007 for £4,150,000. Mr. Orr-Ewing also referred to Flat 14 at 17 Cadogan Square, sold in February 2007 for £3,100,000 in excellent condition having been sold earlier in July 2004 for £1,550,000. The 4th/5th/6th floor flat at 8 Cadogan Square was said to have sold for £2,280,000 in July 2006 in good condition and that the evidence of these three sales point to an extended lease value of £1100 per sq. ft for the top flat in the Building. Mr. Orr Ewing sought to attribute the higher than expected price in fact paid for the top floor flat to a possible desire by the purchaser to stay in Cadogan Square after a divorce and the short lease for which purchasers often pay more.

13. As the value of Flats 2, 3 and 4 were agreed Mr. Orr Ewing addressed the value of Flat 1 in the Building. He relied upon comparables at 18 Cadogan Square (ground and lower floors), 22 Cadogan Square, Flat. 2 Cadogan Square (ground and lower floors) and Flat 10, 78 Cadogan Square. He stated that the average of these four ground and lower ground maisonettes, adjusted is £1,170 per sq. ft. and he attributed a rate of £1,100 per sq. ft. to the subject maisonette in the Building to make a freehold value of £1,800,000.

14. Mr. Orr Ewing stated that as at the valuation date there was no planning obstacle in the way of converting the Building back into a single unit, but that could change in the years ahead as planning constraints change. Further, Mr. Orr-Ewing stated that by 2023 there may be a real risk that it would not be economical to convert the property back into a house and the demand for flats, which had continued until fairly recently, may once again become the norm. Mr. Orr Ewing stated that in his opinion the Building could be valued as a house by either (i) taking the value of an improved house

in Cadogan Square and then making deductions from that to back to the present configuration (a "top down" approach), or look at comparable buildings which have been sold as flats with a view to converting them to a single house (a "bottom up") approach. Mr. Orr Ewing stated he preferred the latter as it involves making fewer assumptions about the cost of conversion and the value of the current condition.

15. Mr. Orr Ewing also valued the Building as a house having made a 10% deduction where a comparable property had a mews house behind it, an adjustment of 3% where the comparable property had a garden or roof terrace and an adjustment of 10% where the comparable property is off the Square. Comparable properties at 23 Cadogan Place, 25 Lennox Gardens, 11 Egerton Place, 16, Cadogan Square, 28 and 36 Cadogan Square were relied upon. Mr. Orr-Ewing stated that a deferment rate of 5% would be appropriate, in line with *Sportelli,* as the building would be flats until expiry of the term.

16. In submissions, Mr. Buck-Pitt stated that in February 2007 it was mainly developers buying houses rather than owner-occupiers. He asserted that the re-conversion to houses from flats was a fairly recent phenomenon and one that was already showing signs of cooling off. He stated that as at the valuation date there was limited evidence of a demand for houses and that therefore Mr. Orr-Ewing's approach was a more reliable one and to be preferred.

Restrictive Covenant as to User

17. It is the Applicant's contention that the following covenant be included in the terms of the transfer. The relevant parts of which state:

"2. Until 25 March 2023 in the following self-contained units:

Basement flat (front):	*as caretaker's flat to be occupied rent-free by a caretaker who shall provide caretaking services to the occupiers of the Property*

Fourth and Fifth Floors:	*self-contained private residential marionette in the occupation of one household only*
Ground Floor and Rear Basement:	*self-contained private residential maisonette in the occupation of one household only*
1st/2nd/3rd Floors:	*each as self-contained private residential flat each in the occupation of one household only*

Thereafter as either a single private dwelling-house in the occupation of one household only or as not more than six self-contained private residential flats/maisonette each in the occupation of one household only."

And:

"3. Not to do or suffer to be done on the Property or on any part thereof or any act or thing that may be or become a nuisance or annoyance to the Transferor or the Company or his or its tenants or to the owners or occupiers of ay adjoining or neigbouring properties."

18. It was said by Mr. Buck-Pitt that the proposed covenant would require the Respondent to use a caretakers flat until 2023. Further, the term in clause 3, restrains acts which, cause "annoyance" as opposed to a "nuisance". Mr. Buck-Pitt, asserted that the burden of proof lies on the Applicant to show that the covenant proposed is reflected in the head lease and is capable of benefiting other property of the landlord, Alternatively the Applicant must show the proposed covenant will not materially interfere with the enjoyment of the building as it has been enjoyed during the currency of the head lease and under leases and is capable of benefiting other property of the landlord and in both cases will materially enhance the value of the landlord's other property. Mr. Munro agreed that the test to be applied both under the 1967 and 1993 Act is as set out in *Moreau v Howard de Walden,* LRA/2/2002.

19. Mr. Buck-Pitt submitted that the requirement of a caretaking provision is not capable of benefiting another building or the buildings belonging to Cadogan. Further, there is no obligation in the under leases to provide a resident caretaker and there is no reason for the caretaker provision to remain in force for another 16 years but not thereafter. Mr. Buck-Pitt asserted that the proposed

covenant limiting the use of the Building is not contained in any of the leases and is a modification rather than an adaptation. Consequently, the onus is on the Applicant to establish that the proposed covenant will not materially interfere with the enjoyment of the property as it has been enjoyed during the lease and it is capable of benefiting other property and will materially enhance the value of other property.

20. It was submitted by Mr. Munro that this proposed covenant preserves the existing restrictive covenants to the term date; recognizes that the property is subject to existing leases and will not be reconverted to a house before the end of the term. It also recognises that as the property is being valued as a property for re-conversion to a house, the covenant has to be relaxed as from the term date. Mr. Munro asserted that the land to be benefited is "the Estate" comprising the adjoining or neighboring lands and known as the Cadogan Estate in Chelsea.

Section 61

21. This states:

> *"(1) Where on a lease of a flat (the new lease) has been granted under section 56 but the court is satisfied, on an application, made by the landlord-*
>
> *(a) that for the purposes of redevelopment the landlord intends-*
> *(i) to demolish or reconstruct, or*
> *(ii) to carry out substantial works of construction on,*
> *the whole or a substantial part of the building in which the flat is contained, and*
>
> *(b) that he could not reasonably do so without obtaining possession of the flat,*
>
> *the court shall by order declare that the landlord is entitled as against the tenant to obtain possession of the flat and the tenant is entitled to be paid compensation by the landlord for the loss of the flat.*
>
> *(2) An application for an order under this section may be made-*
>
> *(a) at any time during the period of 12 months ending with the term date of the lease in relation to which the right to acquire a new lease was exercised; and*
>
> *(b) at any time during the period of five years ending with the term date of the new lease*

22. It was asserted by Mr. Buck-Pitt that section 61 of the Act does not permit the freeholder to obtain possession of Flat 3 at the end of the initial term (2023), as only the immediate leaseholder is entitled to do so. In this case, as the Head Lessee has only a short reversion (10 days after the expiry of all the other leases), so that any application made pursuant to section 61 would not succeed as the Head Lessee could not establish the intention to redevelop etc. The relevant clauses of the lease for Flat 3 state:

> *"For the avoidance of doubt until the expiry or sooner determination of the Head Lease the Head Lessee shall have the benefit of the rights and the burden of the liabilities of the Lessor and the Company under this lease subject to the terms of the Head Lease."*
>
> *(page 2 of lease)*

And:

"There is reserved to the Lessor and the Company

> *(a) at any time during the period of twelve months ending with the Term Expiry Date of the existing lease and*
>
> *(b) at any time during the period of five years ending with the expiry of the Term of the Lease*
>
> *the right to apply to Court for an Order that they may resume possession o f the Demised Premises in accordance with section 61 of the Act for the purpose of demolishing reconstructing or the carrying out of substantial works of construction on the whole or a substantial part of the Building and which the Lessor and the Company could not reasonably do without obtaining possession of the Demised Premises."*
>
> *(page 3 of lease)*

23. Although, this may be a surprising result, Mr. Buck- Pitt stated that the terms of the lease for Flat 3 determine this outcome. He also asserted that a layer of uncertainty was created by the terms of the lease of Flat 3 and the operation of section 61, and these factors prevented the freeholder from being certain of being able to obtain possession. This in turn created a prospect of litigation and this had to be taken into account when making a valuation as Schedule 6 of the Act requires future uncertainties are considered.

24. Mr. Buck-Pitt went on to assert that it is only the immediate landlord who may make such an application by reference to section 57(7)(b) of the 1993Act, a section which sets out the terms on which a new lease must be granted. As a consequence the freeholder cannot be guaranteed of securing possession of the whole building in 2023. As such it would not be wise for an investor to value the property on the valuation date on the basis that it could be turned into a house at the end of the term, and that therefore the Building should not be valued as a house but as flats.

25. Mr. Munro submitted that the Respondent's interpretation of section 61 was erroneous. It avoids addressing the consequences of this construction and the balancing act required, as under the Respondent's construction there is usually not a long enough reversion for anyone to exercise their section 61 rights. Mr. Munro submitted that on the Respondent's interpretation this section cannot be used by intermediate landlords or freeholders in the common situation where the occupation leases are a matter of days shorter than the intermediate lease out of which they are granted and went further by saying that the length of reversion in possession will have to be long enough for the intermediate landlord to carry out works before his term falls in, amortise his costs and make his profit. Mr. Munro stated that if the Respondent were right about section 61 of the Act, this would have the same constraining effect on section 47 of the 1993 Act. He referred the Tribunal to the House of Lords decision in *Majorstake Ltd v Curtis [2007] 1 Ch 300,* where the House of Lords considered the effect of section 47 and the balancing of interests between the landlord and the tenant.

26. Mr. Munro submitted that an application can be made by someone who is the landlord within the meaning of section 61, which would include a freeholder whose intention, or the intention of his successor must be shown at the time of the hearing, *Marks v British Waterways Board,* [1963] 1 WLR 108. The landlord has a reasonable time to give effect to his intention and be in a position to be able to do so and is permitted to give effect to this intention by granting a building lease; *Gilmour Caterers Ltd v Governors of St Bartholomew's Hospital* [1956] 1 QB 387. Mr. Munro did not accept

as correct, the Respondent's attempt to link section 57(7) of the Act to section 61(2) as to who is to make the application.

Inspection:

27. The Tribunal inspected the subject premises both internally and externally. It also made an external inspection of the comparables relied upon by both parties noting particularly their location in Cadogan Square or their proximity to it. It was clear that there would be considerable work involved in reconversion, as the present layout with partition walls, lift and configuration of living rooms, bathrooms and kitchens is unsuitable for use as a single dwelling.

The Decision:

28. The Tribunal notes the parties' agreement that the subject property is worth more as a house than as flats. The Tribunal accepts the Applicant's contention that there is evidence of a growing demand for houses in Prime Central London, notably from overseas buyers, and finds that although the future demand cannot be certainly ascertained are of the view that this preference would, at the valuation date be expected to continue. Although there were suggestions and counter suggestions made as to the lessees' intentions after enfranchisement, the Tribunal is of the view that these matters have nothing to do with the valuation or the issues it must address in reaching its determination. Having regard to the relevant statutory provisions the Tribunal is of the opinion that any valuation made pursuant to this part must take as it starting point the highest value of the property in question. Therefore, the Tribunal accepts the arguments made by Mr. Munro that the Building should be valued as a house rather than as its flats.

29. The Tribunal having determined the starting point as valuation as a house is of the opinion that the deferment rate should also be as for a house. Adopting the approach set out in *Sportelli,* the

Tribunal adopts a deferment rate of 4.75%. The Tribunal can see no reason to make any adjustment to the deferment rate as suggested by Mr. Orr Ewing.

30. In valuing Flat 1, the Tribunal accepted the valuation approach of Mr. Scott-Barett as opposed to the unnecessarily complicated approach adopted by Mr. Orr Ewing. The valuers had agreed to use Savills' index to adjust for time and there could hardly be better evidence of value than a transaction of the flat concerned. Nevertheless, Mr Scott-Barrett had recognised the comparables and subsequent improvements by adjusting his price per sq ft downwards to arrive at a figure lower than simple indexing would produce.

31. In valuing the building as a house both valuers adopted a method, which involved ascertaining a value per sq ft and applying it to the agreed floor area. Analysis was difficult because there is no evidence of the work needed to convert 37 or any of the comparables. Mr. Scott Barrett's conclusion was £1700 per sq ft,. Mr. Orr Ewing came to £1651 as an average of houses, but chose £1350.

32. The transactions in the Square and the wider area were well known to them and there was no dispute over the facts. The differences arose in the importance they each attached to buildings that were already houses, and their opinion on the relative attractions of the premises, in terms of location and other features. In its inspection of the comparables the Tribunal formed the view that buildings with greater architectural distinction might have been considered more valuable in the market for houses but this was not a factor considered specifically by the valuers.

33. Within the square the Tribunal formed the view that prices were adversely affected by proximity to Pont Street (to the north) and lack of garden view. Otherwise the locality was equally valuable. Outside the Square a judgment had to be made as to the relative attractiveness of the locality to the "international market" which underpins the values of the prime addresses for prime central London

houses. Mr. Orr Ewing considered Egerton Place to be as attractive as Cadogan Square, Mr. Scott-Barrett less good. Mr. Orr-Ewing thought Cadogan Place as good; Mr Scott-Barrett considered it worse. At its inspection the Tribunal agreed with Mr. Orr Ewing that Egerton Place is as good, and with Mr Scott-Barrett that Cadogan Place is inferior.

34. In agreeing with Mr. Orr Ewing that modernised houses are unhelpful, because of the extent of adjustments required, the Tribunal focused on transactions of conversions sold for reconversion and unmodernised houses. Taking occasionally a slightly different view on the adjustments required for location and facilities the Tribunal calculates an average for the "blocks" for conversion of £1,515 and for the houses £1,685.

35. It is to be expected that unconverted houses would generally require somewhat less of the internal work needed in houses that had been in flats. Converted houses have fire-walls, kitchens and bathrooms on most floors and other adaptations that need stripping out. Sometimes, as might be the case at No 37, the lift is in the wrong place for a house. Accordingly, even within the limited list, the Tribunal places greater weight on the prices per sq ft that emerge from the "re-conversion" transactions and adopts a rate per sq ft of £1,550. This gives a freehold price with vacant possession ready for conversion of £13,353,250.

36. From this figure there needs to be deducted the cost of buying in Flat 3, either by section 61 process or a "deal" with the owner. The flat is agreed to have an improved value of £2,240,700. An informed investor would take the view that possession of Flat 3 would not necessarily be easy. It might involve legal proceedings or an inducement above the market value. The owner would in any event incur costs and stamp duty (e.g. 4% of £2,240,700 = £89,628) in replacing his flat. The Tribunal considers a sufficient inducement would be not more than £500,000. This would leave a net reversion with vacant possession of £10,612,550.

The Restrictive Covenant:

37. The Tribunal accepts Mr. Buck-Pittt's submission that the onus is on the Applicant to show that the covenants proposed should be included in the terms of the transfer. The Tribunal finds that the Applicant, having accepted what the test is in order to satisfy this burden of proof, has not been able to meet this burden and establish on the balance of probabilities that the test is satisfied by the terms of the restrictive covenant proposed. The Tribunal prefers the Respondent's arguments on this point and finds that para. 5(b)(c) of schedule 7 of the 1993 Act has not been satisfied and therefore determines the restrictive covenant(s) proposed by the Applicant should not be included in the terms of the transfer.

Section 61:

38. The Tribunal prefers the submissions of Mr. Munro on this issue to those of Mr. Buck-Pitt. The Tribunal finds force in Mr. Munro's argument that to accept Mr. Buck-Pitt's argument would render section 61 virtually obsolete. The Tribunal does not accept Mr. Buck-Pitts narrow interpretation of who is included in the definition of "landlord" as referred to in section 61 as meaning only the "immediate" landlord. The Tribunal notes that the lease of Flat 3 satisfies section 57(7)(b) of the 1993 Act by providing that the Head Lessee has the benefit of the rights and the burden of the liabilities of the 'Lessor" and the "Company" as defined in the lease and reserves to them the right to obtain possession of Flat 3 in accordance with section 61 of the 1993 Act.

39. The Tribunal prefers the Applicant's inclusive approach to section 61 and the meaning of "landlord" rather the exclusive narrow approach adopted by Mr. Buck-Pitt, which the Tribunal finds is at odds with the legislative intention of section 61. The Tribunal recognises that the terms of Flat 3 do create an element of uncertainty but not to the degree suggested by Mr. Buck-Pitt and the Tribunal is of the view that these uncertainties are capable of being overcome.

40. In conclusion, the Tribunal determines the premium payable for the freehold of the subject building is £5,276,994 in accordance with the valuation attached as Appendix I.

Chairman: L M Taghavini

Dated: 26/2/08

Valuation of 37 Cadogan Square — Appendix 1

Date of Valuation		19 Feb 2007	
Expiry of Head Lease		25 Mar 2023	
Term unexpired		16.093	years
Ground rent paid		£650	
House value with vacant possession		£10,612,550	
Expiry of underleases (except flat 3)		15 Mar 2023	
Terms unexpired		16.066	years
Expiry of underlease flat 3		25 March 2113	
Rents from participating flats (under 80 years)		£257	
Total Rents		£526	
Apportioned head rent to participating flats		£230	
Relativity		38.50%	

Flat values	Freehold	Current lease
Store rooms	£79,600.00	£30,646
Caretaker's flat	£455,650	£175,425
1 Ground and rear basement (P)	£2,209,950	£850,831
2 First	£2,635,000	£1,014,475
3 Second (P)	£1,901,200	£1,863,176
4 Third (P)	£1,222,975	£470,845
5 Fourth/Fifth	£1,381,250	£531,781
Total value of flats	£9,885,625	

Freehold Capitalisation rate	5.50%	
Leasehold Capitalisation rate	6.0% & 3%, tax at 30%	
Deferment Rate	4.75%	
Multiplier for Freehold Ground rent	10.499	
Multiplier for Leasehold Ground rents	7.662	
Present Value of £1 in 16.09 years at 4.75%	0.4739	

Freeholder's Interest			
Ground rent	£650		
YP 16.09 years at 5.50%	10.499		
		£6,824	
Reversion to vacant possession	£10,612,550		
PV in 16.09 years at 4.75%	0.4739		
		£5,029,287	
			£5,036,112

Freeholder's Interest in Participating Flats under 80 years			
Apportioned ground rent	£230		
YP 16.09 years at 5.75%	10.499		
		£2,415	
Reversion to vacant possession	£3,432,925		
PV in 16.09 years at 4.75%	0.4739		
		£1,626,863	
			£1,629,278

Head Lessee's Interest			
Ground rents received	£526		
Head rent paid	£650		
Loss rent	-£124		
	7.662		
		£950	
Reversion		Nil	
			£950
		Say	£0

Head Lessee's Interest in participating flats under 80 years			
Ground rents recieved	£257		
Apportioned head rent	£230		
		£27	
YP		7.662	
			£207

Marriage Value			
Freehold Value of Participating Flats		£3,432,925	
Less:			
Freehold interest in Participating Flats	£1,629,278		
Head Lessee's Interest	£207		
Participators' current Interests	£1,321,676		
		£2,951,161	
		£481,764	
Share		50%	
			£240,882

Apportionment of Marriage Value:			
Head Lessee's Share	£207		
	£1,629,485	0.01%	£31
Freeholder's Share	£1,629,278		
	£1,629,485	99.99%	£240,851

Compensation to Freeholder:			
Current Interest	£5,036,112		
Share of Marriage Value	£240,851		
		£5,276,963	
Compensation to Head Lessee:			
Current Interest	£0		
Share of Marriage Value	£31		
		£31	
Total			£5,276,994